LAW AND FORCE.

> "The major premise of all Law is moral responsibility, the moral responsibility of individuals for their acts, and no other foundation can any man lay on which a stable fabric of equitable Justice can be reared."
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> Address to Am. Bar Ass'n, Chattanooga, Aug. 31st, 1910.

Some time during the coming year it will be a half century since as a little lad, holding my father's hand I was taken into a dingy, grimy room with tobacco-stained walls on the second floor of the one brick building of an Illinois village. A look at the United States census of 1860 tells me that it had a population in that year of 1277 persons "all white." It was the market village of our farm five miles away. There were several persons in the room whom I do not distinctly recall. One of them my father had come to see and joined with him at once in conversation. He was a man of fifty years or nearly so. To my childish recollection he seems even older than that. Probably he was not quite so old, for nearly thirty-five years later at an old settlers' meeting in that vicinity I heard him described in an obituary, he having died since the last annual meeting of the association, as " a living index to the Illinois Reports and a walking epitome of the Illinois Practice Act, a worthy opponent for any lawyer of the State, inflexibly devoted to his client and regarding every legal contest as a battle royal in which honor, at least, was to be gained on each side by a scrupulous adherence to the rules of the game." On that day of my visit to his den the absorbing topic was that of forcible supremacy on the part of the Federal Government over the States of the South. With his long hair flying as he emphasized his statements by the movements of his head, and his words seeming to jostle one another out of his tobacco-filled mouth, he was declaring with vigorous oaths that the basis of all law was force; that no law, constitutional or other, was law unless there was force behind it; that the southern States had announced an appeal to force, and with augmented profanity he declared that they should and would get enough of it. To a suggestion that great areas with large populations could not in the modern world be permanently pinned together with bayonets, he vociferously declared that a thorough and convincing exhibition of force was all that was necessary. "D——

them," he cried, "they know if we don't, that authority is based on force and they are starting in to use it. The only thing is to show them and show them thoroughly that we have the most of it." The words of the old lawyer stuck fast in my mind. A timid inquiry of my father, if, indeed, all law rested upon force, got from him, an ex-sheriff with a reputation for grimness, only a somewhat abstracted assent.

Such a statement, that law is based upon force, was naturally taken with a child's faith, coming as it did from the emphatic old lawyer who was supreme on that subject in our market village. Doubtless he had read, for he was an omniverous reader, Austin's Province of Jurisprudence Defined. When, some years later, law became for me a subject of serious study, Austin's characterization of it, as rules of conduct prescribed by intelligent beings to intelligent beings over whom the former have power to enforce such rules, and his assertion that the difference between legal rules and mere morality consists simply in the mere presence or absence of the sanction of force, seemed entirely satisfactory. The natural tendency to rest upon any explanation which shoves the difficulty back one step, led to the acceptance of the proposition that law was simply the organized and regular application of political force acting according to rule. The many applications of political force which are distinctly extra-legal, and that the existence of political forces themselves needs an explanation, and that law can and does grow and take shape without the aid of force, had not yet obtruded themselves upon my mind as facts of social experience.

Meantime the great struggle, the echoes of whose preliminaries were heard in that village law office, had gone on. The old lawyer himself had been prominent as a provost-marshal in organizing and forwarding volunteer forces to assist in that "exhibition of force" of which he had spoken. That force was not, indeed, acting through courts or laws, but by more direct methods and speaking in a harsher voice. In the course of that struggle, came the question of arbitrary arrests and the Vallandigham case. Doubtless the best description of it is President Lincoln's letter of June 12, 1863, to Honorable Erastus Corning and others, acknowledging the receipt of the Albany resolutions of protest against the policy of such arrests in States not in rebellion and where no forcible opposition to legal process was likely to be offered and against Vallandigham's arrest in particular.[1] Mr. Lincoln congratulated the

[1] Lincoln, Works, VII, 191.

meeting and correspondents upon the heartiness of the declarations in favor of the Union and especially on the emphatic announcement that they would do their part to maintain the Government and country despite the folly and wickedness of any administration.

He admits that there his letter ought to end, and says that it would, if there were no room for any apprehensions that something more injurious than consequences merely personal to himself might follow censures systematically cast upon him for doing what in his view of his duty he could not forbear. Then he proceeds to say that before his election it had been studiously inculcated in the southern States that they had a right to secede and that it would be expedient to exercise that right whenever a president should be elected opposed to that doctrine. So before he was inaugurated seven States had seceded, the flag had been fired upon and the forts seized, all this under the well-considered reliance that the Constitution and the laws would hinder the Government in checking such efforts. He describes his own reluctance to take methods which he thought fairly within the exceptions of the Constitution and goes on:

"Nothing is better known in history than that courts of justice are utterly incompetent in such cases. Civil courts are organized chiefly for trials of individuals, or at least, of a few individuals acting in concert and in quiet times and on charges well defined in law. Even in times of peace bands of horse thieves and robbers frequently grow too numerous and powerful for ordinary courts of justice. But what comparison in numbers have such bands ever borne to the insurgent sympathizers even in many of the loyal states? The jury too frequently had at least one number more ready to hang the panel than to hang the traitor."

He goes on to demonstrate that the constitutional provision for suspension of the writ of *habeas corpus,* in cases of rebellion or invasion, attests the understanding of those who made the Constitution that ordinary laws in courts of justice are inadequate in such cases. In this, of course, he was simply echoing the words of Cicero who also gave his life as a sacrifice in civil war: *"Inter arma leges silent."*

It would have been interesting to have heard the old village lawyer's comment upon such a demonstration that the machinery of laws and of ordinary legal administration rest for their efficiency not merely upon the assent but upon the active co-operation of practically all the citizens. It has become necessary to examine again his doctrine as to the relationship of force, pure and simple, to the

administration of justice. The philosophic anarchists base their assaults against both upon this identification of law and force, which so many legal writers maintain and which is, especially, the doctrine of some English jurists. The social use just now made of the theory that all law rests on force, and that force is law's distinctive attribute, is to help the anarchist and to retard real social progress. The most powerful and effective of present day attacks upon law and government is doubtless to be found in Tolstoi's essays, "Patriotism and Government," and "Law." His attack is based wholly on the notion that law as well as militarism which, as we have seen, is an opposing idea, depends upon force, upon external constraint. The following extract from the first mentioned essay will show the social use which Tolstoi makes of the proposition that law is based upon physical constraint:

"Is it indeed true that in our time there is any government without which it would be impossible for its people to exist?

"If there was once such a time when governments were indespensable, and a lesser evil than the lack of protection against organized neighbors; nevertheless, at the present time governments have become unnecessary, and a vastly greater evil than that with which the nations threaten each other.

"Governments, surely not armies, but governments in general might be, I do not say, useful, now, but safe, only on condition that they should consist of faultless and holy people as is supposed to be the case in China. But in fact governments, since their activity consists in successful force, are everywhere composed of those elements which are the most opposed to holiness, the rudest, roughest and most depraved of the people.

"Government in its broad sense, including in it the capitalists and the press, is nothing else than such an organization that in it the majority of the people find themselves by means of force subjected to the minority. That smaller part is subordinate to a still smaller, and that smaller to one smaller yet, etc., coming finally to some persons or to one man who by means of military force gains power over all the rest; so that the whole construction is like a cone all the parts of which are brought under the full power of those persons or of that one who finds himself on the top of it.

"The top of the cone is gained by those persons or by that one who is more cunning, more audacious or more conscienceless than the others; or who happens to have been the inheritor from those who were in their time the most audacious and most conscienceless.

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"And to such governments belong the full power, not only over property and life, but over spiritual and moral development, over education, and the religious leadership of all the people.

"The people build up for themselves such a frightful machine

of government, offering to whomsoever it may fall to seize upon that power; and with it all the chances to hold it over the morally helpless man; and the slave is subject to and admires his own foolishness. They fear mines and anarchists but do not fear that terrible structure which every minute threatens them with the utmost misery.

"People found that in order to be protected from enemies it was useful to band themselves together as is done by the protected Caucasians. Now there is no danger at all, yet the people continue to bind themselves.

"Carefully they have bound themselves, so that one man can do with all of them just as he wishes; then they toss out the end of the rope which binds them leaving it to dangle for the first fool or numbskull to seize and do with it whatever suits his needs.

"Indeed, is not that the very same thing which the nations do in making themselves subjects and establishing and maintaining organized governments over them with military power?

"For the liberation of the people from that terrible weight of armaments and wars under which they are now suffering and which go on increasing and increasing, we need neither congresses, conferences, treaties, nor tribunals; but the destruction of that weapon of force, which is called government and from which arises the supreme wretchedness of the people.

"For the abolition of government only one thing is necessary. It is necessary that the people should understand that the sentiment of patriotism, which alone supports that weapon of force, is barbarous, dangerous, shameful, and foolish, and especially an immoral sentiment.

"It is a barbarous sentiment because it is a characteristic only of people standing on the lowest step of moral advancement, expecting from other people that same violence which they themselves are ready to inflict. It is dangerous because it destroys the useful and delightfully peaceful relations of one nation to another; and it especially brings about that military organization of government by means of which authority can and does always accomplish its worst. It is a shameful sentiment because it turns the man, not simply into a slave, but into a fighting cock, a bull, a gladiator, who sacrifices his powers and life not for his own aims but for those of his own government. It is an immoral sentiment because, instead of recognizing himself as a child of God as our Christianity teaches, or at least being a free man led by his own reason, everyone, under the influence of patriotism, recognizes himself as the child of his government and perpetrates crimes against his own reason and his own conscience.

"It is worth while for the people to comprehend this, for then of itself without any struggle, this terrible enchainer of them, which is called government, will fall apart and, together with it, the terrible, useless wrongs which it causes to the nations."

This is the argument which is furnished to the anarchist by the identification of law and force. It is set forth with distinct application to the law itself when separated from militarism in Tolstoi's essay "On Law" (O Prava). Is it a necessary one? Let a Russian philosopher much better informed as to the history and nature of legal rules than is Count Tolstoi be consulted.

At the time of his death in 1902 Korkunov was at the head of the official legal instruction in the empire of Russia. He declares the doctrine that constraint is the essential and distinctive characteristic of law to be a result of the Cartesian conception of the complete separation between mind and matter, between which there was thought to be no mutual bond and no reciprocal influence. Each, in the Cartesian conception, had its own peculiar forces. The exterior order of law could not be upheld by internal agents and therefore constraint could have no psychic foundation but must rest upon external force.[2] And he goes on:

"This doctrine contains a very grave error, as I shall endeavor to prove. Constraint is neither a fundamental, nor even a general, attribute of juridical phenomena. First of all, it is not a fundamental attribute. One calls fundamental, an attribute which is presupposed by all the others from which they all flow in such sort that without it the phenomenon could not be conceived to exist. All the other characteristics depend upon the fundamental one. By it alone can we conceive a phenomenon, since it carries in itself, so to speak, all the rest.

"But constraint is not connected with law in this manner. We can conceive of law without this attribute. If society were composed only of perfect men, constraint would be superfluous and unknown. Each one without stimulation by it would respect the right of another and fulfill his own duties. Law would exist none the less, for in order to fulfill my duties and render to each what is his, I must know wherein my duties consist and what is owed to each one. Even in the real society of men with all their weaknesses it is recognized that society is the more normal the more rarely constraint is used.

"Inadmissible is the law which is supported completely and exclusively by constraint alone; inadmissible a state of things where no one fulfills voluntarily his juridical duty, where it is necessary to constrain everybody to obedience of the law. It is inadmissible because what power is there to be charged in such case with exercising the right of constraint?"

To the argument that force is at least an indispensable condition for the establishment of law, because otherwise the restraint upon

[2]General Theory of Law (Eng. trans.) 96.

those who should obey it would merely be an assistance to the law-breaker, Korkunov replies:

"At first sight these arguments appear irrefutable. But on examining them it is not difficult to show that they go too far and either prove nothing or too much. In fact, if law can really be observed at all, only on condition of being absolutely and rigorously so by all the world, then it never will be observed. When the law in force has a coercive sanction it may still be broken. There is not in the world any power which can constrain every one to obey it. Moreover, men in general do not guide their conduct by certainty since it is hardly ever to be had; but they act upon probability, which answers practically to show us the line of conduct to follow. So far as concerns law, men are satisfied with a probability of its observance in the great mass of cases. Whether law has a coercive sanction or not, there never is assurance that it will be observed by everybody under all circumstances. Under no conditions is it certain that all animals attacked by contagious maladies will be destroyed as quickly as possible; but that this requirement may be reasonable it answers that it is likely that most of them will be, for thus we may hope that the disease will not spread as readily as before. But if it is probable, even before its publication, that the law will be observed in most cases, constraint does not go for nothing. Thus it is almost certain that, even when coercive measures are taken with a view to assuring the completest application of the measure, a law for the destruction of diseased animals will be observed only if everybody thinks it useful.

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"In all this discussion in speaking of constraint physical constraint is meant. The whole argument relates to that. Constraint can, certainly, be understood differently. Thus, Ihering in making constraint the fundamental attribute of law, has in view not only physical but also moral constraint. Why not give it this large meaning? If it is taken thus, the idea of constraint is enlarged so as to make the discussion useless. If constraint is regarded as including both physical and moral pressure, it certainly does accompany all juridical phenomena. But when so understood, it serves as the sanction not only of juridical norms, but also of moral principles, religious dogmas, and even the 'laws' of logic and æsthetics. The conscious violation of moral duty is inseparable from ideas of repentance, of fear and of contempt. Sin evokes the idea of wrath and chastisement from God. The violation of the rules of logic brings error and uncertainty in results obtained."

Of course, if Tolstoi is right, and government, legal as well as military, is simply an application of physical constraint, that truth must be recognized and reckoned with. If, on the other hand, Korkunov is right and force is neither fundamental nor essential to law, if, as Lincoln and Cicero both declare, when it be-

comes a mere question of the stronger force the possibility of law vanishes, that fact must be recognized and the anarchist deprived of so much of his argument, at least. Lincoln and Cicero both paid for the right to an opinion on this subject, but of course that would not necessarily show them to have been right.

Constraint of some sort is inevitably associated with human laws: but is it wholly, or predominantly, or, necessarily, in any degree, a merely physical constraint? The fundamental difference between "laws" legal and "laws" scientific, is that the latter have their establishment in the universe around us quite independently of human agency and would go on operating just as well if non-compliance with them were suddenly to remove the last representative of the human race from the face of the earth; while the former are social rules of adjustment for the regulation of conflicting interests, established, maintained and administered by human volition and assent. If the foregoing is a fair characterization of it, can there be any question as to the wholly subordinate place which mere physical force has in the establishment or maintenance of any given system of law?

A little attention to the matter shows that it is simply a question as to the means by which the uniformity resulting through legal adjustments is brought about. Is that uniformity the result of physical constraint? The inquirer may either interrogate himself or ask his neighbors or look into the records. In any case he will find that the cases of actual use of force are insignificant in comparison with the whole mass regulated and that too, even in the matter of the criminal law. Even Alexander Hamilton in his famous *dictum* that men must be governed by fraud or force places fraud first as he evidently must to be sure of enough force to apply coercion.

Hume's proposition that men are controlled by opinion and that the preponderance of force is on the side of the governed has always been the real truth. To say otherwise, is to affirm that men in masses have no intelligence or volition and must be moved as the railroad builder moves soil for his roadway. The uniformity in social action proves the existence of social law, just as uniformity in the phenomena of nature proves the existence of natural law. In fact, the essence of the "law" in each case is that very uniformity. In either case the recognition by accredited representatives, of society on the one hand, and of the given science on the other, of the uniformity of action will establish the law.

The attempt to complete the action of social law by force is merely a recognition of the imperfection of social machinery and a crude attempt to remedy it. Doubtless, such use of force is justified by Rousseau's defense of it, that, otherwise, laws would work to the advantage of the base and the harm of the good. These latter would observe the laws towards those who would not observe them in turn.[3] This very defense of coercion, however, assumes not merely a voluntary submission to law; but activity in its support on the part of the great majority.

The growth of international law with no sanction except that of reason, and of international opinion, shows clearly enough that force is not necessarily associated with law in our minds. No one feels any violation of logical consistency in such a use of the word law. The steady and rapid growth of such use and of the subject with which it is connected appears, for instance, in the fact that no fewer than fourteen recent books upon this subject were reviewed in the Law Quarterly Review for April. Ex-President Roosevelt in his address at Christiania before the Commission in regard to the Nobel prize clearly indicates how the sanction of force is likely to become attached to it.

"Such a treaty [one providing for international arbitration] would ensure peace unless one party deliberately violated it. Of course, as yet there is no adequate safeguard against such deliberate violation, but the establishment of a sufficient number of these treaties would go a long way towards creating a world opinion which would finally find expression in the provision of methods to forbid or punish the violation."[4]

Does not Mr. Roosevelt here indicate the real genesis of the sanction of force? Must it not follow and not precede the establishment of the uniformity which it is designed to guarantee?

There are many indications that legal rules began as voluntarily adopted regulations, the penalty for whose violation was simply expulsion from the regulated body or from the protection of the rule. "There is much significant evidence that the early tribunals had no power of directly enforcing their own decrees."[5] They merely determined voluntarily submitted disputes. The *peine forte et dure,* to compel a plea, and submission of it to a jury, in crown cases, was, evidently, an attempt to comply formally

[3]Du Contrât Social, L. II, ch. vi.
[4]26 Law Q. Rev. 200.
[5]Maine, Early Law and Custom 387.

with an ancient rule that a jury could only act as to a party who voluntarily submitted to it.

The state, to be sure, is the great dispenser of force and compulsion, as Korkunov shows.[6] As he shows also, it is not the sole or earliest source of law.[7] Mere subjection to its arbitrary compulsion, however, is not subjection to law and may put one outside of it.[8] Law arises, rather, from resistance to force arbitrarily used.[9] As Prof. Ross says:

"The technique of coercion calls into being a counter technique of freedom. In England, for instance, where the intruding Normans had brought the instruments of rule to a rare perfection, the industrial classes, long before they were able to master and use government for their own ends, had learned to safeguard themselves by hedging it with certain checks. With their Acquired Rights they built a rampart against the formidable engine in the hands of their spoilers. The right to bind law upon the sovereign, the right to forbid a standing army in time of peace, the right of citizens to assemble, to petition, to keep and bear arms, to be secure from unreasonable searches and seizures, to suffer only on trial and conviction, to be tried by their peers, and to be exempt from cruel or unusual punishments availed to strip the class state of its most dreaded powers, and have justly come to be looked upon as the attributes of a free people. In this way force has become law, and might have been transmuted into right."[10]

If the main function of law has been in both England and America the putting of a curb upon governmental force and reducing its arbitrary action, has it been different in any other land?

As above indicated, the writer for many years accepted as religiously as did the old village lawyer from whom he first heard it, Austin's basing of all authority upon force. It seems clear now, however, that Austin's conception was due to the Benthamite identification of law with legislation, and to the necessity which Austin felt for a clear distinction between law and morality. English thinkers no longer go with him as to the first of the two.

Professor Maitland[11] cites with approval Sir Henry Maine's declaration that early law has the appearance of having been secreted in the interstices of procedure.[12] The Benthamite and

[6]General Theory of Law (Eng. trans.) 341.
[7]*Id.* 140.
[8]*Id.* 141, 355.
[9]*Id.* 355.
[10]Social Control 387.
[11]Equity 295.
[12]Early Law and Custom 389.

Austinian conception that law must be something which legislation has expressly or impliedly adopted may be considered as thoroughly abandoned.

The other inducement to base law on governmental force is that it may have a distinguishing test to separate it from the rules of morality. Constraint, of course, has no relation to morality and an act absolutely constrained by force has no moral character attached to it. The rules which have to do merely with morals relate to individual character and conduct. The rules of law govern social action and the realization of interests.[13] It may be granted that uniformity of social action will be enforced more or less thoroughly by the same forces which first inaugurated the establishment of that uniformity and that force is among those means. But it is not the only, nor by any means the strongest, one at the command of the social body, and it is nothing less than a libel upon its rules to make their connection with brute force the test or basis of their validity.

It is a libel also upon the human nature which in all ages and climes has required that brute force, if it must be used by the body politic for purposes of self-preservation, shall at least be subjected to the rules of law.

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[13]Korkunov, General Theory of Law (Eng. trans.) 55 *et seq.*